



National Labor Relations Board

Weekly Summary of NLRB Cases

Division of Information

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CASES SUMMARIZED
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DLC Corp., d/b/a Tea Party Concerts and/or Live Nation	Mansfield, MA	1
Durham School Services LP	St. Louis, MO	1
Loparex LLC	Hammond, WI	2
Oaktree Capital Mgmt., LLC and TBR Property, LLC d/b/a Turtle Bay Resorts, and Benchmark Hospitality, Inc.	Honolulu, HI	3
SPE Utility Contractors, LLC	Port Huron, MI	4
Spurlino Materials, LLC	Indianapolis, IN	5

OTHER CONTENTS

List of Decisions of Administrative Law Judges	5
List of No Answer to Complaint Cases	6

List of Unpublished Decisions and Orders in Representation Cases <ul style="list-style-type: none"> • Contested Reports of Regional Directors and Hearing Officers • Miscellaneous Board Decision and Orders 	6

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DLC Corp., d/b/a Tea Party Concerts and/or Live Nation (1-RC-22162; 353 NLRB No. 130) Mansfield, MA March 31, 2009. The Board, reversing the hearing officer, sustained the Union's objection alleging that the Employer improperly promised 4 hours' pay to off-duty employees in exchange for voting in the representation election. The Board set aside the election result and directed a second election. [\[HTML\]](#) [\[PDF\]](#)

The Employer promotes, stages, and presents music concerts at multiple venues, including the Tweeter Center, a summer-season facility in Mansfield, MA. The Union sought to represent the Employer's stagehands working at the Tweeter Center.

In a pre-election campaign letter to the stagehands, the Employer offered 4 hours' pay to those stagehands who were "not on a call" at the Tweeter Center, i.e., off-duty, if they voted in the election. Fifty-six stagehands were not on-call when the election was conducted. The Union lost the election, 53 votes to 48, with 2 non-determinative challenged ballots.

The Union objected to the Employer's offer. The hearing officer, however, concluded that it would be appropriate policy, and consistent with Section 8(c) of the Act to permit employers to pay employees for their time spent voting, whether on duty or off. Therefore, the recommendation overruled the Union's objection.

The Board disagreed. It declared that *Sunrise Rehabilitation Hospital*, 320 NLRB 212 (1995), is current Board law and controlling in the present case. Under *Sunrise*, a party's payment to employees for attending the election is objectionable conduct, unless the payment is for reimbursement of actual transportation expenses. As in *Sunrise*, the Employer in the present case offered additional pay to off-duty employees in return for voting; the offer was substantial; it was not linked to reimbursement for travel or other costs; and the number of employees potentially affected was significant. The Board rejected, as a post-hoc rationale, the Employer's argument that the offer was intended for reimbursement purposes. The Board also noted that in any event this rationale had not been substantiated.

Member Schaumber added a personal footnote pointing out that *Sunrise* was applied here on institutional grounds, and noting that the issue of travel/expense reimbursement related to voting in representation elections should be revisited at an appropriate time. *Durham School Services LP*, 353 NLRB No. 129, slip op. at 1 fn. 2 (2009) cited.

(Chairman Liebman and Member Schaumber participated.)

Durham School Services LP (14-RC-12713; 353 NLRB No. 129) St. Louis, MO March 31, 2009. The Board adopted the Regional Director's finding that the Employer's offer of 2 hours' show-up pay to off-duty employees to come to the Employer's facility during the election constituted objectionable conduct. Accordingly, the Board adopted the Regional Director's recommendation to set aside the election. [\[HTML\]](#) [\[PDF\]](#)

The Employer provides school bus transportation services. In an election held Oct. 17, 2008, the Employer's drivers and monitors cast 59 votes for Laborers International Union of North America Local 509, 77 against, and 1 challenged ballot.

During the month prior to the election, the Employer distributed a flyer to employees that stated: "Because Durham believes that it is important that you are given an opportunity to exercise your right to vote, the Company will pay anyone not scheduled to work on Friday at the request of your school district two (2) hours of pay if you show up at work and check-in with dispatch while the polls are open. Please understand that this does not mean you have to vote and if you vote, you may vote either 'yes' or 'no.'"

At meetings held two days before the election, the Employer told employees that if they were not scheduled to work on election day but came to vote, they would get 2 hours' show-up pay. The Employer gave show-up pay to 37 off-duty employees on Oct. 17.

The Regional Director found that, under the Board's decision in *Sunrise Rehabilitation Hospital*, 320 NLRB 212 (1995), "monetary payments that are offered to employees as a reward for coming to a Board election and that exceed reimbursement for actual transportation expenses amount to a benefit that reasonably tends to influence the election outcome." Applying this standard, the Regional Director found that the amount of show-up pay that the Employer offered was substantial and that 37 employees received the pay. He also noted that the show-up pay was not linked to transportation expenses and, therefore, employees would reasonably perceive it as a favor which might make them feel obligated to vote against the Union. Thus, the Regional Director found the Employer's offer of show-up pay objectionable.

The Board adopted the Regional Director's finding. Member Schaumber stated that he did so for institutional reasons, as the Regional Director's finding was consistent with Board precedent. Member Schaumber indicated that, were he writing on a clean slate, he would permit employers and unions to reimburse employees not scheduled to work during polling hours for reasonable transportation expenses incurred in traveling to the polling place and would permit unions and employers to reimburse all employees for actual wages lost because of voting. He would require that the offer be made to all eligible voters and include a statement that the reimbursement was intended solely to increase participation in the election and not to interfere with or influence how employees vote.

(Chairman Schaumber and Member Liebman participated.)

Loparex LLC (18-CA-18436, et al.; 353 NLRB No. 126) Hammond, WI March 31, 2009. The Board adopted the administrative law judge's findings that the Respondent violated Section 8(a)(1) of the Act by: (1) promulgating a new, more restrictive bulletin board policy after it became aware of union activity at its plant; (2) restricting access to its parking lot by off-duty employees; (3) promulgating an overly broad restriction on the distribution of Union literature

and buttons; and (4) promulgating a restriction on talking about unions. The Board also adopted the judge's finding that the Respondent's shift leaders were not supervisors under Section 2(11), and, as a result, the Respondent violated Section 8(a)(1) when it prohibited them from engaging in pro-union activity. In so doing, the Board found that, among other things, the Respondent failed to prove that its shift leaders exercised the authority to assign using independent judgment. [\[HTML\]](#) [\[PDF\]](#)

The Board also adopted the judge's recommended dismissal of allegations that the Respondent unlawfully threatened and disciplined an employee in violation of Section 8(a)(1) and (3).

(Chairman Liebman and Member Schaumber participated.)

Charges filed by Teamsters Local 662; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Minneapolis on May 14, 2008. Adm. Law Judge Paul Bogas issued his decision Nov. 12, 2008.

Oaktree Capital Mgmt., LLC and TBR Property, LLC, a single employer, d/b/a Turtle Bay Resorts, and Benchmark Hospitality, Inc. (37-CA-6601-1, et al.; 353 NLRB No. 127) Honolulu, HI March 31, 2009. The Board adopted the administrative law judge's findings that the Respondents committed numerous violations of Section 8(a)(1) of the Act. In affirming the findings that the Respondents violated Section 8(a)(1) by telling union representatives that they were trespassing and had no right to be on the property (contrary to their contractually-established right of access), by issuing trespass notices to them, by evicting them from the resort, and by summoning law enforcement officials to remove or assist in removing them. In affirming the finding that the Respondents unlawfully followed union representatives and eavesdropped on their conversations with employees, the Board relied only on the judge's analysis of the events of Feb. 10 and March 3 and 10, 2005. In affirming the finding that the Respondents unlawfully photographed or videotaped union representatives and employees who were engaged in lawful demonstrations, the Board relied on the judge's analysis of the events of March 25, 2004. In affirming the finding that the Respondents unlawfully prevented union representatives and employees from accessing the public beaches adjacent to the resort, the Board relied only on the judge's analysis of the events of Feb. 12, 2004. The Board found it unnecessary to pass on the judge's findings that the Respondents committed similar violations on other dates inasmuch as such findings would be cumulative and would not materially affect the remedies ordered by the Board in this case. [\[HTML\]](#) [\[PDF\]](#)

The Board adopted the judge's findings that the Respondents violated Section 8(a)(3) and (1) by discharging employee Mark Feltman, by suspending employee Timothy Barron, and by warning employee Jeannie Martinson. With respect to Feltman's discharge, the Board noted that the judge described the General Counsel's initial burden in terms of four evidentiary elements rather than the traditional three, and found pretext rather than dual motivation. See *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U. S. 989 (1982),

approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983). The Board found that the Respondents proved the existence of a legitimate reason for disciplinary action but failed to persuade by a preponderance of the evidence that they would have taken the same action in the absence of protected conduct.

The Board adopted the judge's findings that the Respondents violated Section 8(a)(5) and (1) by unilaterally changing the access provisions of the collective bargaining agreement and by refusing or unreasonably delaying in providing the Union with requested information relevant to the Union's duties as the employees' bargaining representative. However, the Board did not adopt the judge's dismissal of Section 8(a)(5) and (1) allegation concerning the Respondents' Jan. 28, 2005, requirement that union agents pay for parking, which the Respondents had previously validated, when the union agents visited the resort for representational purposes. The judge noted that there was no evidence of the amount the Respondents required union representatives to pay for parking, and that therefore the judge felt unable to conclude whether the change in parking privileges was a significant change that would require the Respondents to bargain before making the change.

The General Counsel, in exceptions, noted that the judge erroneously failed to consider record evidence of monetary amounts of the validated parking that the Respondents provided the union representatives. The Board therefore found that there was evidence of the monetary amounts at issue for the parking privileges unilaterally revoked by the Respondents. The Board then severed and remanded this issue to an administrative law judge with directions to consider this evidence and to issue a supplemental decision analyzing whether the Respondents violated Section 8(a)(5) and (1) as alleged.

The Board found no abuse of discretion concerning the judge's many evidentiary and procedural rulings to which the Respondents excepted. The Board noted that Section 102.35 of the Board's Rules and Regulations provide that a judge should "regulate the course of the hearing" and "take any other action necessary" in furtherance of the judge's stated duties and authorized by the Board's Rules. Thus, the Board accords judges significant discretion in controlling the hearing and directing the creation of the record.

(Chairman Liebman and Member Schaumber participated.)

Charges filed by UNITE HERE! Local 5; complaint alleged violations of Section 8(a)(1), (3), and (5). Hearings at Honolulu, July 19-29 and Oct. 18-26, 2005. Adm. Law Judge Joseph Gontram issued his decision May 24, 2006.

SPE Utility Contractors, LLC (7-CA-50767; 353 NLRB No. 123) Port Huron, MI March 30, 2009. The Board adopted the administrative law judge's findings that the Respondent violated Section 8(a)(4) and (1) of the Act by discharging employee Linda Leuch in order to limit its

potential backpay to her in another unfair labor practice proceeding and because Leuch testified in that proceeding. The Board adopted the judge's recommended expunction remedy, including that Leuch's discharge not be used in any way against her. [\[HTML\]](#) [\[PDF\]](#)

(Chairman Liebman and Member Schaumber participated.)

Charge filed by Linda M. Leuch, an individual; complaint alleged violation of Section 8(a)(1), (3), and (4). Hearing at Detroit, April 30 and Oct. 23, 2008. Adm. Law Judge Ira Sandron issued his decision Dec. 17, 2008.

Spurlino Materials, LLC (25-CA-30053, et al.; 353 NLRB No. 125) Indianapolis, IN March 31, 2009. The Board adopted the administrative law judge's conclusions that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally assigning unit work at the Warehouse project to nonunit employees, by unilaterally creating the positions of "portable plant driver" and "alternate/back-up portable plant driver" at the Stadium project, and by instituting a new evaluation system and aptitude testing (driving tests) to select the portable plant drivers from among unit employees. The Board further adopted the judge's conclusions that the Respondent violated Section 8(a)(3) and (1) by failing to select three prominent union supporters as portable batch plant drivers, and by later suspending and then discharging one of them, and that the Respondent also violated Section 8(a)(1) by failing to accord the discharged employee his union representation rights during the investigatory meeting preceding his suspension. [\[HTML\]](#) [\[PDF\]](#)

The Board reversed the judge to find that the Respondent violated Section 8(a)(3) and (1) by discriminatorily failing to dispatch the same three prominent union supporters according to the established seniority system for the deliveries to the Stadium project prior to the staffing of the portable plant operation at that project. The Board also reversed the judge to dismiss the allegation that the Respondent violated Section 8(a)(5) by failing to timely answer the Union's information request. Finally, the Board disagreed with the judge's recommendation to extend the Union's certification year, and deleted provisions for that remedy from the Order and notice.

(Chairman Liebman and Member Schaumber participated.)

Charges filed by Teamsters Local 716; complaint alleged violations of Section 8(a)(1), (3), and (5). Hearing at Indianapolis on April 24-27, May 30-31, and Oct. 18, 2007. Adm. Law Judge Ira Sandron issued his decision Dec. 17, 2007.

LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Tower Automotive Operations USA, I, LLC (Individuals) Chicago, IL March 31, 2009. 13-CA-44668, 44894; JD-13-09, Judge Michael A. Rosas.

Wall Street Source, Inc. (an Individual) New York, NY April 1, 2009. 2-CA-38727; JD(NY)-12-09, Judge Steven Fish.

Coastal Insulation Corp., and Elmsford Insulation Corp., and Sealrite Insulation of New York (an Individual) East Windsor April 2, 2009. 22-CA-28439; JD-11-09, Judge Earl E. Shamwell.

LIST OF NO ANSWER TO COMPLAINT CASES

(In the following cases, the Board granted the General Counsel's motion for summary judgment based on the Respondent's failure to file an answer to the complaint.)

American Postal Workers Local 984 (an Individual) (11-CB-3922; 353 NLRB No. 124) Fayetteville, NC March 30, 2009. [\[HTML\]](#) [\[PDF\]](#)

Tom Arand, P.C. d/b/a Animal Care Clinic (Equal Justice Center) (16-CA-26387; 353 NLRB No. 128) Round Rock, TX March 31, 2009. [\[HTML\]](#) [\[PDF\]](#)

LIST OF UNPUBLISHED BOARD DECISIONS AND ORDERS IN REPRESENTATION CASES

(In the following cases, the Board considered exceptions to Reports of Regional Directors or Hearing Officers)

**DECISION AND DIRECTION [proceeding remanded
to Regional Director to open and count ballots]**

Conn-Selmer, Inc., Elkhart, IN, 25-RD-1505, March 30, 2009 (Chairman Liebman and Member Schaumber)

DECISION AND CERTIFICATION OF REPRESENTATIVE

A.M. Ortega Construction, Inc., Lakeside, CA, 21-RC-20823, April 3, 2009 (Chairman Liebman and Member Schaumber)

Miscellaneous Board Decisions and Orders

**ORDER [denying Employer's request for Special
Permission to Appeal Regional Director's decision]**

*The Research Foundation of the State University of New York at Buffalo, Amherst, NY,
3-RC-11882, March 31, 2009*
